PASUPATHI SITHAMPARAM v. ADAM ABDULLAH

COURT OF APPEAL, PUTRAJAYA
VERNON ONG LAM KIAT JCA
HASNAH MOHAMMED HASHIM JCA
ASMABI MOHAMAD JCA
[CIVIL APPEAL NO: W-02(NCVC)(A)-2004-11-2016]
16 APRIL 2018

LAND LAW: *Caveat – Removal – Application for – Borrower and lender entered into loan agreement – Borrower granted lender option to purchase borrower's land in event loan not repaid – Borrower entered into sale and purchase agreement with applicant for sale of land – Land could not be transferred to applicant as lender lodged private caveat over land – Whether lender had caveatable interest over land – Whether applicant had locus to file application for removal of caveat – Whether caveat ought to be removed – National Land Code, ss. 323(1) & 327*

CIVIL PROCEDURE: *Locus standi – Land matters – Application for removal of caveat – Borrower and lender entered into loan agreement – Borrower granted lender option to purchase borrower's land in event loan not repaid – Borrower entered into sale and purchase agreement with applicant for sale of land – Land could not be transferred to applicant as lender lodged private caveat over land – Whether lender had caveatable interest over land – Whether applicant had locus to file application for removal of caveat – National Land Code, ss. 323(1) & 327*

Pursuant to a loan agreement, the respondent ('the defendant') agreed to lend to one Malarkodi ('the borrower') the sum of RM275,000. The loan agreement stipulated that, *inter alia*, (i) the loan was repayable within one month of the date of the loan agreement ('the payment due date'); (ii) the borrower granted to the defendant an option to purchase the borrower's land ('the land') at the prevailing market price; and (iii) in the event the loan was not repaid by the payment due date, the defendant shall have the right to exercise the option to purchase the land at the purchase price of RM275,000. Meanwhile, the borrower entered into a sale and purchase agreement with the appellant ('the plaintiff') for the sale of the land. However, the land could not be transferred to the plaintiff as the defendant had lodged a private caveat over the same, to safeguard his interest, following the loan agreement entered with the borrower. The plaintiff commenced an application at the High Court to remove the defendant's private caveat. Dismissing the plaintiff's application, the Judicial Commissioner ('the JC') held that, *inter alia*, the borrower had given the option to purchase the land under the loan agreement and, without the option, the defendant would not have given the loan to the borrower. Therefore, the defendant had a caveatable interest over the land. Hence, the present appeal by the plaintiff. In resisting the plaintiff's appeal, the defendant raised a preliminary issue that the plaintiff had no *locus* to file the application because he had paid a portion of the purchase price to a third party instead of the borrower *qua* vendor.

Held (allowing appeal with costs; setting aside decision of High Court and allowing plaintiff's application)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The plaintiff's *locus* was not challenged or disputed by the defendant as it was not pleaded by the defendant in his affidavit. The plaintiff was a person aggrieved by the existence of the private caveat over the land and, accordingly, had the necessary *locus* to apply for its removal pursuant to s. 327 of the National Land Code ('the NLC'). (para 11)

(2) What amounts, in law, to a caveatable interest is clearly spelt out under s. 323(1) of the NLC which provides that a private caveat may be entered in the following instances: (i) any person claiming title to, or any registrable interest in, any alienated land; (ii) any person claiming a beneficial interest under any trust affecting such land or interest; and (iii) a guardian or next friend of any minor claiming to be beneficially entitled under any trust affecting such land or interest. (para 14)

(3) The JC founded his decision on the fact that the defendant had an option to purchase the land on the basis of the affidavit evidence filed in the proceedings. The grounds upon which the defendant gave, in support of his claim, was that pursuant to the loan agreement, he gave a loan of RM275,000 to the borrower. There was no mention or reference to an option in the grounds of the application or in the statutory declaration. As such, the JC did not confine his examination to the grounds contained in the application for the caveat. (paras 17 & 18)

(4) The option had lapsed as the defendant failed to exercise the option within one month period immediately after the borrower failed to repay the loan. It could not be said that there was a transaction that could ultimately lead to its registration. The mere existence of an option was insufficient, in law, to support a caveat. (para 19)

Bahasa Malaysia *Headnotes*

Berikutan satu perjanjian pinjaman, responden ('defendan') bersetuju meminjamkan RM275,000 kepada seorang bernama Malarkodi ('peminjam'). Perjanjian pinjaman ini menetapkan, antara lain, (i) pinjaman hendaklah dibayar dalam satu bulan dari tarikh perjanjian pinjaman ('tarikh luput bayaran'); (ii) peminjam memberi defendan opsyen membeli tanah peminjam ('tanah tersebut') pada harga pasaran; dan (iii) jika pinjaman tidak dibayar sebelum tarikh luput bayaran, defendan berhak melaksanakan opsyen membeli tanah pada harga belian RM275,000. Pada masa yang sama, peminjam memeterai satu perjanjian jual beli dengan perayu ('plaintif') untuk jualan tanah tersebut. Walau bagaimanapun, tanah tersebut tidak boleh dipindah milik kepada plaintif kerana defendan telah memasukkan kaveat persendirian atasnya untuk melindungi kepentingannya sendiri, susulan perjanjian pinjaman yang dimeterai dengan peminjam. Plaintif memulakan

permohonan di Mahkamah Tinggi untuk menyingkirkan kaveat persendirian defendan. Menolak permohonan plaintif, Pesuruhjaya Kehakiman ('PK') memutuskan, antara lain, peminjam memberi opsyen membeli tanah tersebut bawah perjanjian pinjaman dan, tanpa opsyen tersebut, defendan mungkin tidak memberi pinjaman kepada peminjam. Oleh itu, defendan mempunyai kepentingan boleh kaveat atas tanah. Maka timbul rayuan ini oleh plaintif. Membantah rayuan plaintif, defendan membangkitkan isu awalan bahawa plaintif tidak mempunyai *locus* memfailkan permohonan kerana dia telah membayar bahagian harga belian kepada pihak ketiga dan bukan peminjam, sebagai penjual.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan keputusan Mahkamah Tinggi dan membenarkan permohonan plaintif)
Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) *Locus* plaintif tidak dicabar atau dipertikaikan oleh defendan kerana tidak diplidkan oleh defendan dalam afidavitnya. Plaintif ialah orang yang terkilan dengan kewujudan kaveat persendirian atas tanah dan, sewajarnya, mempunyai *locus* memohon penyingkirannya bawah s. 327 Kanun Tanah Negara ('KTN').

(2) Apa-apa yang, bawah undang-undang, terjumlah sebagai kepentingan boleh kaveat diperuntukkan bawah s. 323(1) KTN yang menyatakan kaveat persendirian boleh dimasukkan dalam hal-hal keadaan berikut: (i) mana-mana orang yang menuntut hak milik, atau apa-apa kepentingan yang boleh didaftar, dalam mana-mana tanah beri milik; (ii) mana-mana orang yang menuntut faedah benefisial bawah mana-mana amanah yang menyentuh apa-apa tanah atau kepentingan sedemikian; dan (iii) penjaga atau orang yang mewakili mana-mana remaja yang menuntut sebagai berhak, secara benefisial, bawah mana-mana amanah menyentuh tanah atau kepentingan sedemikian.

(3) Pesuruhjaya Kehakiman mengasaskan keputusan beliau pada fakta bahawa defendan mempunyai opsyen membeli tanah tersebut berdasarkan keterangan afidavit yang difailkan semasa prosiding. Alasan yang diberi oleh defendan, menyokong tuntutannya, adalah bahawa susulan perjanjian pinjaman, dia memberi pinjaman sebanyak RM275,000 kepada pembeli. Opsyen tidak disebut atau dirujuk dalam alasan-alasan permohonan pengisytiharan statutori. Oleh itu, PK tidak mengehadkan pemeriksaan beliau pada alasan-alasan yang terkandung dalam permohonan kaveat.

(4) Opsyen telah tamat kerana defendan gagal menjalankan opsyen dalam tempoh satu bulan, dengan serta-merta, selepas peminjam gagal membayar pinjaman. Tidak boleh dikatakan terdapat transaksi yang akhirnya membawa pada pendaftaran. Kewujudan opsyen semata-mata tidak cukup, bawah undang-undang, untuk menyokong kaveat.

Case(s) referred to:

Chong Siat Yong & Ors v. Yee Mun Ying & Anor [1986] 1 CLJ 37; [1986] CLJ (Rep) 320 HC ***(refd)***

Kundang Lakes Country Club Bhd v. Garden Masters (M) Sdn Bhd [1999] 2 CLJ 633 CA ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

Registrar of Titles Johore v. Temenggong Securities Ltd [1976] 1 LNS 135 PC ***(refd)***

Score Options Sdn Bhd v. Mexaland Development Sdn Bhd [2012] 7 CLJ 802 FC ***(refd)***

Tan Leng Choo & Ors v. Law Teck Huat [2008] 1 LNS 568 CA ***(refd)***

Trans-Summit Sdn Bhd v. Chun Nyook Lin [1996] 3 CLJ 502 CA ***(refd)***

Legislation referred to:

National Land Code, ss. 323(1)(a), (b), 327

For the appellant - M Kaliaperumal & Priyadharsini Nair; M/s Kali & Assocs
For the respondent - P Sundramoorthy; M/s Ram

[Editor's note: For the High Court judgment, please see Pasupathi Sithamparam lwn. Adam Abdullah [2016] 1 LNS 1782 (overruled).]

Reported by Najib Tamby

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] The appeal herein is against the decision of the High Court dismissing the plaintiff's application to remove the defendant's private caveat lodged over a piece of land. In this judgment, the parties shall be referred to as they were in the court below.

Salient Background Facts

[2] Pursuant to a friendly loan agreement dated 19 June 2015 ("the loan agreement"), the defendant agreed to lend to one Malarkodi a/p Maratha Muthu ("the borrower") the sum of RM275,000. Insofar as this appeal is concerned, the salient terms of the loan agreement are as follows:

(i) The loan is repayable within one month of the date of the loan agreement ("the payment due date");

(ii) The borrower granted to the defendant an option to purchase the borrower's land held under HSD 40161, Lot 26988, Mukim Petaling, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur ("the land") at the prevailing market price; and

(iii) In the event the loan sum is not repaid by the payment due date, the defendant shall have the right to exercise the option to purchase the land at the purchase price of RM275,000.

[3] Meanwhile on 22 October 2015, the borrower entered into a sale and purchase agreement with the plaintiff to sell the land to the plaintiff for the purchase price of RM500,000. The purchase price has been paid in full. However, the land could not be transferred to the plaintiff as a land search conducted on 28 March 2016 showed that a private caveat had been lodged by the defendant over the land. As such, the duly executed and stamped memorandum of transfer could not be presented for registration.

[4] The defendant had lodged a private caveat over the land on 17 March 2016. According to the application for entry of private caveat (Form 19B) lodged by the defendant, his claim to the land is grounded in the following terms:

> Pada 19/6/2015 saya telah membuat satu Perjanjian ('Friendly Loan Agreement') dengan Malakodi a/p Maratha Muthu (No. K/P: 631116-01-6460). Beliau telah meminjam wang sebanyak (RM275,000.00) daripada saya pada 19/6/2015. Alasan-alasan selanjut adalah di surat akuan yang dilampirkan bersama. Oleh itu saya ingin memasukkan kaveat ini ke atas tanah sepertimana dalam jadual untuk memelihara kepentingan saya terhadap hartanah ini yang dikenali sebagai Geran 58829, Lot 26988, Mukim Petaling.

[5] For completeness, the defendant's statutory declaration verifying the claim is reproduced below:

> Surat Akuan
>
> Saya, Adam Bin Abdullah (NO. K/P: 520115-10-5283) adalah seorang warganegara Malaysia yang beralamat di No. 316, Jalan 24/39, Taman Petaling, Kepong Bahru, 51200 Kuala Lumpur dengan sesungguhnya dan sebenarnya mengakui Pada 19/6/2015 saya telah membuat satu Perjanjian ("Friendly Loan Agreement") dengan Malakodi A/P Maratha Muthu (NO. K/P: 631116-01-6460). Beliau telah meminjam wang sebanyak (RM275,000.00) daripada saya pada 19/6/2015. Saya memasukkan kaveat ini untuk mempertahankan kepentingan saya terhadap hartanah yang dikenali sebagai Geran 58829, Lot 26988, Mukim Petaling.
>
> Saya, membuat akuan ini dengan kepercayaan bahawa apa-apa yang tersebut didalamnya adalah benar serta menurut Akta berkanun 1960.
>
> Diperbuat dan dengan sebenar benarnya diakui oleh)
> Adam Bin Abdullah)
> di Kuala Lumpur)
> di Wilayah Persekutuan
> pada 17 Mac 2016.)
>
> signed illegible
> ...
> Adam Bin Abdullah
>
> Dihadapan saya,
>
> ...
> Pesuruhjaya sumpah

A **Findings Of The High Court**

[6] The learned Judicial Commissioner (JC) dismissed the application on the following grounds:

(i) The borrower had given the option to purchase the land under the loan
B agreement and that without the option the defendant would not have given the loan to the borrower. As such the defendant had a caveatable interest over the land;

(ii) There was a serious question meriting a trial relating to the *bona fides* of the sale and purchase transaction between the plaintiff and the borrower;
C and

(iii) The balance of convenience lies in favour of maintaining the *status quo*.

Submission Of Parties

[7] Learned counsel for the plaintiff took two main points. First, the
D defendant does not have any right to enter a caveat on the land as the defendant is not claiming title to the land or any registrable interest or any right to such title or interest to the land nor is the defendant claiming any beneficial interest under any trust affecting the land. The defendant only has a monetary claim against the borrower. A monetary claim does not amount
E to caveatable interest (*Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719; *Kundang Lakes Country Club Bhd v. Garden Masters (M) Sdn Bhd* [1999] 2 CLJ 633; [1999] 2 MLJ 537; *Trans-Summit Sdn Bhd v. Chun Nyook Lin* [1996] 3 CLJ 502; [1995] 3 MLJ 247 (CA); s. 323(1)(a) & (b) of the National Land Code).

F **[8]** Second, the defendant did not exercise the option to purchase the land within the one month period immediately after the borrower defaulted in the payment of the loan. As such, the option had lapsed after the expiry of the one month period and has no effect pursuant to cl. 5 of the loan agreement. Consequently, it was argued that there was no concluded contract between
G the defendant and the borrower for the sale and purchase of the land (*Tan Leng Choo & Ors v. Law Teck Huat* [2008] 1 LNS 568; [2009] 1 MLJ 820 (CA)). At any rate, an option to purchase does not amount to a caveatable interest in the land (*Score Options Sdn Bhd v. Mexaland Development Sdn Bhd* [2012] 7 CLJ 802 (FC)).

H **[9]** In reply, learned counsel for the defendant argued firstly that the plaintiff had no *locus* to make the application because he had paid a portion of the purchase price to a third party instead of to the borrower *qua* vendor. As such, the sale and purchase agreement is a sham.

I **[10]** Secondly, the defendant's caveatable interest is based on the option to purchase the land in the event the loan is not repaid. The borrower has not repaid the loan sum to the defendant. As such, the defendant lodged a caveat against the land to protect his interest. Learned counsel conceded that there

is no evidence on the record to show that the defendant had exercised the option to purchase. In answer to a question posed by the Bench, learned counsel conceded that there was nothing in the appeal record to show or suggest that the defendant had exercised the option to purchase the land.

Decision Of This Court

[11] We will deal with the *locus* issue as a preliminary issue. We agree with learned counsel for the plaintiff that the plaintiff's *locus* was not challenged or disputed by the defendant as it was not pleaded by the defendant in his affidavit. At any rate, on the undisputed facts, we are satisfied that the plaintiff is a person aggrieved by the existence of the private caveat over the land and accordingly has the necessary *locus* to apply for its removal pursuant to s. 327 of the National Land Code (NLC).

[12] The principal issue for determination in this appeal is the question of whether the defendant has any caveatable interest on the land. The law on this subject is well settled (see *Luggage Distributors* (*supra*)).

[13] The procedure to be adopted by court on the hearing for removal of a caveat may be distilled into the following three steps:

(i) Conduct an examination of the grounds set out in the application for the caveat: this is a question of mixed fact and law. If the grounds expressed in the application are insufficient in law to support a caveat, then *cadit quaestio* (the dispute is over), and the caveat must be removed without having to go any further.

(ii) If the claim as set out in the application in Form 19B amounts in law to a caveatable interest, the defendant must also show on the affidavit evidence that his claim discloses a serious question meriting a trial. This is question of fact.

(iii) If the court is satisfied that there is a serious question meriting a trial, the court will go on to consider whether the balance of convenience or balance of justice lies.

[14] What amounts in law to a caveatable interest is clearly spelt out under the NLC which provides that a private caveat may be entered in the following instances: (i) any person claiming title to, or any registrable interest in, any alienated land; (ii) any person claiming a beneficial interest under any trust affecting such land or interest; and (iii) a guardian or next friend of any minor claiming to be beneficially entitled under any trust affecting such land or interest (s. 323(1) of the NLC).

[15] The question of what is a caveatable interest was considered by the Federal Court in *Score Options* (*supra*). The following principles may be distilled from the judgment of the apex court:

A (a) Unlike registrable interests in land (such as ownership of land, leases, charges and easements) or interests that are incapable of registration (such as tenancies exempt from registration), caveatable interests are unregistered interests which are capable of protection by the entry of a private caveat;

B (b) The purpose of a caveat is to protect an interest in land, or a right to an interest in that land and to preserve the *status quo* of the land pending the enforcement of such interest or right;

(c) Only a claimant who has a caveatable interest under the NLC may lodge a caveat;

C

(d) Only parties who are authorised to lodge a private caveat are those who may effect dealings in the particular interests in the land;

(e) To be caveatable, the interest must be an interest in the land which is capable of registration. In other words, it must represent a transaction

D that can ultimately lead to its registration on the Register; and

(f) The registrable interest that the caveator is claiming for under s. 323(1)(a) of the NLC must have a present or existing interest as opposed to a potential interest in the land or interest in future.

E **[16]** It is also settled law that a claim for a mere debt cannot amount to a caveatable interest (*Registrar of Titles Johore v. Temenggong Securities Ltd* [1976] 1 LNS 135 PC).

[17] We will deal with the first step to be adopted by the court on the hearing for removal of a caveat. The learned JC decided that the defendant

F has a caveatable interest on the basis that without the option the defendant would not have given the loan to the borrower. In other words, the learned JC founded his decision on the fact that the defendant had an option to purchase the land on the basis of the affidavit evidence filed in the proceedings.

G **[18]** As adverted to in paras. [4] and [5] above, the grounds upon which the defendant gave in support of his claim is that pursuant to a friendly loan agreement he gave a loan of RM275,000 to the borrower. There is no mention or reference to an option in the grounds of the application or in the statutory declaration. As such, we are constrained to hold that the learned

H JC did not confine his examination to the grounds contained in the application for the caveat.

[19] It is trite that if the grounds contained in the application are insufficient in law to support a caveat, then the caveat must be removed without having to go any further. Be that as it may, even if the fact that the

I defendant had been granted an option is taken into account, there is no evidence to indicate that the defendant had exercised the option to purchase

the land immediately after the expiry of the due repayment date or within a reasonable time thereafter (*Chong Siat Yong & Ors v. Yee Mun Ying & Anor* [1986] 1 CLJ 37; [1986] CLJ (Rep) 320). We agree with the submission of learned counsel for the plaintiff that the option had lapsed as the defendant had failed to exercise the option within the one-month period immediately after the borrower failed to repay the loan. In this circumstance, it cannot be said that there was a transaction that can ultimately lead to its registration on the register. As such, on the particular facts of this case, the mere existence an option is of itself clearly insufficient in law to support a caveat.

[20] In the light of the findings aforesaid, it is not necessary for the court to consider the question of whether the defendant's claim discloses a serious question for trial and the question of the balance of convenience.

[21] By reason of the foregoing, we are constrained to set aside the decision of the learned JC. The plaintiff's appeal is allowed with costs. The plaintiff's application is allowed in prayers (a), (b), (c) and (d).